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The Oxford Guide to Treaties; Edited by Duncan B. Hollis; *Recent Books on International Law: Book Reviews*

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BOOK REVIEWS

The Oxford Guide to Treaties. Edited by Duncan B. Hollis. Oxford, New York: Oxford University Press, 2012. Pp. lxxviii, 804. Index. \$230, cloth; \$69.95, paper.

“The treaty . . . serves as a sort of Swiss army knife for international law” (p. 36). This analogy by Duncan Hollis, a professor of law at Temple University, comes to mind again and again in reading *The Oxford Guide to Treaties* for which he was the editor. The *Guide*, which received the American Society of International Law’s 2013 Certificate of Merit for high technical craftsmanship and utility to practicing lawyers and scholars, itself reads like an elaborate owner’s manual—expertly, lovingly, and painstakingly written. It comprehensively covers the law of treaties and provides considerable insight into treaty practice. Scholars and practitioners alike will find it tremendously useful.

The *Guide* contains six sections. The first five sections have chapters authored or coauthored by twenty-eight contributors on particular issues within treaty law or practice. The first section covers foundational questions of what a treaty is and who can make one; the next three sections deal with the formation, application, and interpretation of treaties; and the fifth section covers breach, other avoidance of treaty commitments, and exit from treaties. The last section of the book contains sample clauses that relate to the law of treaties or constitute departures from its defaults.

This is a book packed with expertise. The contributors are a mix of academics and practitioners mainly from North America, Europe, and international organizations, and collectively they log centuries of experience with treaties. They frequently have prior publications in the specific areas covered by their chapters, such as Marise Cremona on the European Union as a treaty maker, Geir Ulfstein on treaty bodies, and Richard Gardiner on the rules of treaty interpretation in the Vienna Convention on the Law of Treaties (VCLT).

Certain features are consistent across all the chapters. Structurally, each chapter has clear introductory and conclusory remarks, as well as a list of recommended reading at the end. Substan-

tively, the chapters are not only rich in doctrinal detail but also packed with descriptions of and examples from practice. Thus, Olufemi Elias’s chapter on international organizations (IOs) as treaty makers surveys the kinds of treaties that IOs tend to make, and Tom Grant’s chapter on treaty makers other than states and IOs proceeds largely by examples ranging from the Swiss cantons to insurgents in El Salvador. Syméon Karagiannis describes an assortment of colonial clauses and federal clauses in his chapter on the territorial application of treaties, and Malgosia Fitzmaurice discusses a handful of important examples in considering the fundamental changes of circumstances that justify suspension or termination of treaty obligations. And so on. For readers focused on doctrine and practice, the *Guide* thus offers enough depth that, for many purposes, it can be an ending place as well as a starting point.

More variation exists in the extent to which the chapters engage in historical, theoretical, or normative analysis. Unsurprisingly, this variation correlates with the background of the authors. For example, the chapter on treaty making by George Korontzis and the chapter on treaty depositaries and registration by Arancha Hinojal-Oyarbide and Annebeth Rosenboom, all at the UN Office of Legal Affairs, have little in the way of analysis but offer rich descriptions of practice. At the other end of the spectrum, Jan Klabbers of the University of Helsinki begins his chapter on treaty validity and invalidity by drawing on Hans Kelsen’s work. This is not to say that differences in emphasis between practitioners and academics are always present; as an example, both Robert Dalton’s chapter on provisional application of treaties and Curtis Bradley’s chapter on treaty signature include historical accounts. More generally, though, the choices of whether and how to go beyond description seem to have been left to the individual authors.

The *Guide* acknowledges that its closest relation is Anthony Aust’s *Modern Treaty Law and Practice*. Aust’s book is frequently cited in the recommended reading, and he contributed a chapter to the *Guide* on political commitments that is drawn largely from his book. Both the *Guide* and Aust’s

book are excellent books as resources for practitioners: strong in doctrine, well indexed and referenced, and clearly written. The most straightforward differences are that the *Guide* is longer, often more detailed, and broader in the perspectives provided by its multiple authors. Another, perhaps more interesting difference is that the books make different choices in relation to the VCLT. Aust's book embraces the VCLT not only as setting out the law of treaties but also as the organizing principle for thinking about treaty law and practice. His book has an early chapter devoted to the VCLT; most of the rest of the book covers the law of treaties in an order that tracks the order used in the VCLT; and he takes up some topics not covered by the VCLT only at the end of his book.¹

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The *Guide*, by contrast, steps further away from the VCLT in its organizational structure. Its sections follow treaty issues that can arise from formation to termination. It is this progression, not the VCLT's ordering, that structures the book. Thus, where Aust's book leaves to the end state succession and countermeasures—both topics not covered by the VCLT—the *Guide* locates state succession in its section on treaty application (in a chapter by Gerhard Hafner and Gregor Novak) and countermeasures in its section on breach, avoidance, and exit (in a chapter by Bruno Simma and Christian Tams). As another example, the *Guide* puts the late David Bederman's chapter on third-party rights and obligations in its section on treaty application, while the VCLT and Aust's book discuss third-party states immediately after treaty interpretation. The *Guide* also includes an excellent chapter by Kal Raustiala on the role that nongovernmental organizations (NGOs) play in treaty making, an issue not addressed in the VCLT. These choices reflect an attempt to use practice rather than the VCLT as the organizational reference point for the *Guide*.

This issue of organization points to deeper questions about the overall relationship between

the VCLT and practice. Roughly eighty years ago, the authors of the treaty portion of Harvard's Research in International Law observed that "there is no clear and well-defined law of treaties" and that "the making of treaties is for the most part in the hands of persons who are not experts and whose habits lead them to seek results with little regard for legal forms."² Reading the *Guide*, it is clear just how much has changed in the intervening years. While leaving room for further clarification, the VCLT has created a clear and well-defined law of treaties that was lacking in earlier eras. As Hollis observes, the VCLT, along with its *travaux* and other preparatory work, has come to be "the lens through which States and their lawyers address treaty questions" (p. 2). The chapters of the *Guide* itself illustrate this point. While the *Guide* as a whole consciously steps away from the VCLT in its organization, many of the individual chapters use the VCLT to structure their internal organization. (Some chapters do try to bring other lens to bear, such as Hollis's own chapter on defining treaties and Christopher Borgen's chapter on fragmentation and treaty conflicts.) If in earlier days treaty practice may have involved too little consideration of the law of treaties, today the law of treaties dominates how we think about treaty practice.

But how much does the law of treaties actually affect practice? Consider the distinction between compliance and effectiveness, with *compliance* meaning "conformity between behavior and a legal rule or standard" and *effectiveness* meaning "the degree to which a legal rule or standard induces desired changes in behavior."³ It is often easier to assess compliance rather than effectiveness, and this situation may be especially true with respect to the VCLT. As Hollis observes, the VCLT has a "celebrated flexibility" (p. 3). This reality makes it both relatively easy for states to comply with the VCLT and relatively difficult to measure how effective the VCLT is in terms of actually changing state behavior. While the *Guide*

¹ See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* vii–xxii (2d ed. 2007). In the first half of his book, Aust does address some topics not covered by the VCLT, such as political commitments and domestic legal practices relating to treaty implementation.

² Research in International Law, *Law of Treaties*, 29 AJIL SUPP. 653, 666 (1935).

³ Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 388 (2000).

does an excellent job of considering state compliance with the VCLT, it is more piecemeal on the subject of the VCLT's effectiveness.

The VCLT embraces flexibility in at least three respects. First, there are areas of silence—issues that the VCLT simply does not cover. Some of these issues have been mentioned earlier, and another important one is the internal procedures that states have for joining and implementing treaties (covered in the *Guide* in a chapter by David Sloss). Here, the VCLT is relevant only for the fact that it does not govern these issues.

Second, the VCLT includes some flexible standards. While Articles 31 and 32 do not make treaty interpretation as free-form as Myres McDougal desired,⁴ they are still understood to leave considerable room for maneuvering. In their respective chapters on treaty interpretation for IO charters and for human rights treaties, Catherine Brölmann and Başak Çali both read Articles 31 and 32 as expansive enough to cover specialized rules in these contexts. Brölmann emphasizes that “the VCLT framework [on interpretation] is famously broad, subsidiary and not very hierarchically structured” (p. 508), while Çali considers that the “principles of interpretation enshrined in Article 31 . . . are flexible enough to incorporate human rights treaties” (p. 526). In other words, Brölmann and Çali conclude that interpretive practices for IO charters and for human rights treaties comply with the VCLT rules on treaty interpretation. But they do not consider effectiveness, and the reader is left wondering how much the law of treaty interpretation, as set forth in the VCLT, has actually shaped the ways in which IO charters and human rights treaties are interpreted. Indeed, causality may also run in the other direction: rather than (or complementary to) Articles 31 and 32 shaping the interpretation of these specialized treaties, the existence of these specialized treaties may have helped to give rise to a more flexible interpretation of Articles 31 and 32.

⁴ See Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AJIL 780, 789–90, 809–18 (2013) (describing McDougal's position and his efforts to advance it at the VCLT's negotiation).

The third form of flexibility in the VCLT is its use of default rules. Borrowing on Hollis's analogy, the law of treaties itself bears some resemblance to a Swiss army knife as it allows negotiators to do considerable picking and choosing. To give a few examples, the VCLT explicitly allows the parties to contract around its default rules for treaty amendment, for treaty reservations, and for treaty termination, as discussed in chapters by Jutta Brunnée, Edward Swaine, and Laurence Helfer. These chapters do an excellent job not only of explaining the default rules but also of recognizing that treaty negotiators often take advantage of their right to contract around these rules. Helfer, for example, notes empirical evidence suggesting treaties frequently contain explicit termination provisions, thus declining to adopt the VCLT's default rules.

The VCLT thus governs in part by not governing—or, put more precisely, achieves widespread compliance partly by deliberately declining to prioritize effectiveness. The heavy use of default (as opposed to absolute) rules allows treaty negotiators to structure treaties as they deem best, while at the same time providing a template that serves both as a reference point and as a backdrop option. Further research will be needed to assess how well or how poorly states take advantage of this flexibility. For example, some initial work suggests that states do not always make the best use of their options in negotiations, perhaps due to behavioral biases.⁵ For those conducting empirical work in the field, the *Guide* will serve as a valuable source of information about the underlying law of treaties.

In closing, one final portion of the *Guide* deserves mention: the selection of treaty clauses found at the end of the book. Treaty negotiators will find much of value here, as the selection showcases the many ways in which negotiators can and have structured process-related clauses. Flipping through these clauses also conveys just how diverse

⁵ See Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT'L L. 309, 328–44, 356–59 (2013); cf. Lauge N. Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties*, 58 INT'L STUD. Q. 1, 9–10 (2014).

international agreements can be; for example, the first clause included is from the nonbinding Memorandum of Principles and Procedures Between the Republic of Moldova and the State of North Carolina (USA) Concerning Their Desire to Strengthen Their Good Relations. This section is

carefully crafted and thorough. It continues and completes the all-around usefulness of the *Guide*.

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